FEBRUARY 2009
ESSAY QUESTIONS 1, 2, AND 3

California
Bar
Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Betty formed and became president and sole shareholder of a startup company, ABC, Inc. ("ABC"), which sells a daily on-line calendaring service. ABC retained Lucy, a lawyer, to advise it about a new trademark.

As ABC was very short on cash, Lucy orally proposed that, in lieu of receiving her usual $200 per hour fee, she could become a 1% owner of ABC. On behalf of ABC Betty orally agreed. Lucy performed 20 hours of legal work and received her ABC stock shares. Years later, Lucy would sell her shares back to Betty for $40,000.

While Lucy was performing legal services for ABC, she discovered certain representations by ABC that were false and misleading and caused customers to pay for services they would never receive. She reported her discovery to Betty, who told her to ignore what she had found. After Lucy finished her legal work for ABC, she reported the false and misleading representations to a state consumer protection agency.

Betty sold all of her interest in ABC, including the shares previously held by Lucy, and formed and became president and sole shareholder of another startup company, XYZ, Inc. ("XYZ").

After Lucy had finished her work for ABC and closed that file, she was retained by a new client, Donna, in a trademark dispute with XYZ.

What ethical violations, if any, has Lucy committed? Discuss.

Answer according to California and ABA authorities.

Question 2

Copyco, Inc. (“Copyco”), a maker of copy machines, was incorporated in State A. Most of Copyco’s employees work in State B at its sole manufacturing plant, which is located in the southern federal judicial district of State B. Copyco also has a distribution center in the northern federal judicial district of State B.

Sally is a citizen of State B. Sally was using a Copyco copy machine at Blinko, a copy center within the northern federal judicial district of State B, when the machine started to jam. When Sally tried to clear the jam, she severely injured her hand. She underwent several surgeries at a nearby hospital. Her physician believes she may never recover the full use of her hand.

Sally filed a lawsuit against Copyco as the sole defendant in the State B northern district federal court. Her complaint alleges that Copyco was negligent and that she has suffered physical injury, and also seeks damages of $100,000, exclusive of costs and interest.

The federal court has subject matter jurisdiction to hear Sally’s lawsuit on the basis of diversity of citizenship. Copyco, however, moved for a change of venue to the southern federal judicial district of State B. The court denied Copyco’s motion.

Sally wishes to obtain from Blinko a copy of the maintenance records for the copy machine that caused her injuries.

Questioning the extent of the injuries Sally alleged, Copyco wishes the court to compel Sally to appear for an examination by both a physician and a psychologist of Copyco’s own choosing.

1. Was the federal court correct to deny Copyco’s motion for change of venue? Discuss.

2. (a) Is Sally entitled to a copy of the maintenance records? Discuss.

   (b) If so, how must she proceed to obtain them? Discuss.

3. (a) Is Copyco entitled to an order to compel Sally to appear for an examination by a physician and an examination by a psychologist chosen by Copyco? Discuss.

   (b) If so, how must it proceed to obtain such an order? Discuss.

Question 3

Dustin has been charged with participating in a robbery in California on the morning of March 1.

(1) At Dustin's trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

During the direct examination of Wendy, the following questions were asked and answers given:

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?
Wendy: That is correct.

(3) Prosecutor: Did you speak with Dustin on that day?
Wendy: Yes, I spoke to him in the afternoon, by phone.

(4) Prosecutor: What did you discuss?
Wendy: He said he'd be late coming home that night because he had to meet some people to divide up some money.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?
Wendy: Yes. I spoke with my friend Nancy just before she died.

(6) Prosecutor: What did Nancy say to you?
Wendy: Nancy said that she and Dustin had "pulled off a big job" that afternoon.

(7) Prosecutor: Did Nancy explain what she meant by "pulled off a big job"?
Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item **(1)** and properly admit the evidence in items **(2)** - **(7)**? Discuss.

Answer according to California law.

FEBRUARY 2009

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

PANNINE v. DRESLIN, et al.

FILE

PANNINE v. DRESLIN, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia 11113

MEMORANDUM

To: Applicant

From: Gerry Morris

Date: February 24, 2009

Re: **Pannine v. Dreslin, et al.**

We represent Ralph Pannine in a federal court diversity contract action against Rene Dreslin ("Dreslin"), a French citizen, living in London, England, and two foreign corporations, one of Gibraltar and the other of Luxembourg, each controlled by Dreslin. All three defendants have been properly served and have made appearances in the action. We allege that the defendants breached the contract by (1) refusing to pay Pannine after he performed the work he committed to do; and by (2) transferring the asset that was the subject of the contract. We conducted extensive discovery that establishes the absence of meaningful business records and that Dreslin and the two corporations took steps to hide their only asset, four U.S. patents that cover a valuable technology called Perception Processing ("PP"). The actions of the defendants demonstrate that they are likely to sell or otherwise transfer their United States patents to avoid their being subject to post-judgment execution.

We need to convince the court to grant the plaintiff a preliminary injunction to prevent the defendants from selling or transferring the PP patents. If the defendants sell or transfer the patents to someone beyond the jurisdiction of the court, we will lose any chance of satisfying our client's probable judgment. Following our firm's guidelines, which are attached, please draft a persuasive memorandum of points and authorities in support of our client Pannine's motion for a preliminary injunction. Be sure to argue that the record supports a conclusion that each of the elements necessary for a preliminary injunction is clearly present.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia 11113

MEMORANDUM

TO: Attorneys

RE: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to attorneys, all persuasive briefs or memoranda, such as memoranda of points and authorities to be filed in court, shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated briefly, cogently, and accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position.

Following the Statement of Facts, the Argument should begin. This firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER**: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER**: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts support our position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Finally, there should be a short conclusion stating why our client should prevail.

Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v. CASE NO. 08-61674-Civ-Cohn

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

Plaintiff Ralph Pannine asks the Court to exercise its inherent equitable powers and issue a preliminary injunction to prevent the sale or other transfer of Defendants Rene Dreslin, B.E.V. Holding, S.A., and Carlos Magnus Limited's (collectively "Defendants") assets, four United States patents that cover the Perception Processing ("PP") technology, in order to ensure that the patents are available to satisfy the Plaintiff's probable judgment for damages.

Plaintiff has reason to believe Defendants will sell or otherwise transfer the patents for

the PP technology beyond the jurisdiction of this Court unless the Court grants the relief requested.

The facts that give rise to the Plaintiff's concerns about the disposition of Defendants' assets are set out in the attached Declaration of William Brown. The facts establish that the assets (the patents covering the PP technology) are extremely valuable and the only assets known to the Plaintiff that are owned and controlled by the Defendants.

In this breach of contract action, this Court has the authority to grant the requested equitable relief pursuant to Columbia Business Code § 77.1 et seq.

Dated: February 24, 2009

Respectfully submitted,
Morris, McIntosh, Coleman & Quick, PA

Gerry Morris

by: Gerry Morris, Esq.
Attorneys for Plaintiff

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v.

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

CASE NO. 08-61674-Civ-Cohn

DECLARATION OF GERRY MORRIS IN SUPPORT OF PLAINTIFF'S REQUEST FOR EQUITABLE RELIEF

1. I, Gerry Morris, am an attorney for Plaintiff Ralph Pannine ("Plaintiff"), and I make this declaration on my personal knowledge in support of Plaintiff's Motion for a Preliminary Injunction. All of the facts recited herein are supported by the exhibits filed separately as an appendix to this declaration. 2. Defendant Rene Dreslin ("Dreslin") is an individual, and the controlling shareholder, and managing director of Defendants Carlos Magnus Limited, a Gibraltar corporation ("Carlos Magnus"), and B.E.V. Holding, S.A. ("B.E.V. Holding"), a Luxembourg corporation.

3. On November 9, 2004, Plaintiff entered into a written agreement ("Agreement") with the Defendants to provide consulting services in connection with

Defendants' desire to sell, license, or otherwise transfer a unique technology known as Perception Processing ("PP"). The Agreement is one of the exhibits in the appendix. At the time of contracting, the four (4) U.S. patents covering the PP technology were owned by Carlos Magnus. 4. The Agreement provides that Plaintiff would identify and negotiate with potential buyers, licensees, and transferees of the PP technology with the object of effecting a sale, licensing arrangement or other transfer of the technology and that either Defendant Carlos Magnus and/or Defendant Dreslin would, in the aggregate, pay Plaintiff one percent of the total gross proceeds of any deal concluded with Plaintiff's participation, up to US $13.5 billion in gross proceeds. 5. The agreement also provides that Plaintiff is entitled to payment upon the occurrence of any of the following events: (a) the sale of the patents covering the PP technology; (b) the sale of any shares in Carlos Magnus; or (c) the licensing of PP. 6. As conceded by the Defendant Dreslin in his deposition testimony, Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology, to the point of obtaining commitments to acquire the PP technology, all within the price range set forth in the Agreement. 7. In his deposition testimony, Defendant Dreslin affirmatively acknowledged that the PP technology is worth many millions, perhaps billions, of dollars on the technology market. 8. Between 2004 and 2007, Defendants, without informing Plaintiff, transferred ownership or other interests, including the right to use the PP technology, to various entities without adequate consideration and with the object of delaying or otherwise impeding the rights of creditors. In all cases, the transferor did not receive any consideration, nor did the transferee pay any consideration for the transfer. Discovery to date has revealed the following: (a) In July 2004, GABFI, Ltd., a Luxembourg corporation, which was owned and controlled by Defendant Dreslin and which, at the time, owned all of the rights to the four US patents covering the PP technology, transferred all of its interest in PP to Carlos Magnus.

(b) In October 2005, Dreslin caused all of the stock in Carlos Magnus to be transferred to B.E.V. Holding.

(c) In October 2008, while this action was pending (this action was filed in August 2008), B.E.V. Holding granted an exclusive license of the PP technology to Tech Development, S.A., yet another Luxembourg corporation owned by Defendant Dreslin. This licensing agreement recited that it "comes into effect retroactively on January 1, 2008," a date prior to the initiation of this action.

(d) Although the patents themselves remain in the hands of B.E.V. Holding, the effect of the exclusive license granted to Tech Development, S.A. is to transfer the entire economic value of the patents to Tech Development, S.A. because no other person or entity can deal with the PP technology in any way that will produce revenues.

9. Defendants have admitted in various discovery requests by Plaintiff that Defendants have failed to maintain, and are therefore unable to produce, any meaningful business and financial records, even such elemental documents as stock ledgers, lists of stockholders, financial statements, and records relating to the PP technology.

10. It is undisputed that in the past 10 years, Defendants have invested in excess of US $15 million in the development and perfection of the PP technology.

11. The only known or reported asset of Defendants and the transferee entities referred to above is the PP technology represented by four US patents.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of February, 2009 in East Plantation, Columbia.

Gerry Morris

Gerry Morris

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v.

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

CASE NO. 08-61674-Civ-Cohn

PLAINTIFF'S NOTICE OF INTENT TO RAISE ISSUES CONCERNING FOREIGN LAW IN CONJUNCTION WITH MOTION FOR PRELIMINARY INJUNCTION

Under Rule 44.1 Columbia Rules of Civil Procedure, in conjunction with his contemporaneous filing of his Motion for Preliminary Injunction, Plaintiff Ralph Pannine ("Plaintiff") gives notice that he intends to raise issues concerning the law of Gibraltar and Luxembourg regarding the legal requirements of companies established and operated under the laws of each country to maintain books, records, accounts, audits and other business records as well as the general business laws of each country. Such laws are relevant to establish Defendants' transfers of economic rights in the four U.S. patents were fraudulent and that, unless enjoined, Defendants are likely to put the

patents and their value out of the Court's reach, making it impossible for Plaintiff eventually to satisfy any judgment.

Plaintiff intends to offer expert testimony, documents and other relevant material or sources to the Court to determine the foreign law at issue.

Dated: February 24, 2009

Respectfully submitted,

Morris, McIntosh, Coleman & Quick, PA

Gerry Morris

by: Gerry Morris, Esq.

Attorneys for Plaintiff

COLUMBIA STATE UNIVERSITY
COLLEGE OF LAW

W.L. JIMETS
MARTIN PRESS PROFESSOR OF INTERNATIONAL LAW

February 17, 2009

Gerry Morris, Esq.
Morris, McIntosh, Coleman & Quick, PA
Columbia Trust Tower – Suite 1100
East Plantation, Columbia 11113

Dear Mr. Morris:

I have reviewed the standard books and treatises in international company law printed in English and available in the United States. I also reviewed the published statutes and regulations dealing with the company law of Gibraltar and Luxembourg (the latter in the original French) and will testify that they support the conclusions provided below.

As to Gibraltar, a British Commonwealth nation, an outside auditor must certify annually that the provisions of the Gibraltar corporation law are being observed. An annual meeting must be held to approve the accounts although the annual meeting does not have to be held in Gibraltar. An annual tax return must be filed with details about the share capital and names of registered directors and shareholders. The annual return also must show the amount called up on each share as well as the total amount of indebtedness with regard to mortgages and other contracts that evidence an obligation in excess of US $25,000. Under Gibraltar law, all companies, with the exception of private United Kingdom companies, must file annual accounts with the Registrar of Companies, the Gibraltar Commissioner of Income Tax, or with any relevant Government department or agency. Insurance companies can send their accounts in confidence to the Financial Secretary.

Gibraltar has adopted the 7th European Union company directive requiring annual publication of a corporation's audited consolidated financial statements in a newspaper of general circulation. Gibraltar also has adopted the 4th European Union company directive applying generally accepted accounting principles to both public and private companies.

In Luxembourg, all companies must maintain regular books of account regarding the operations of the company or branches in accordance with the *Code de Commerce.* All companies must engage, at a minimum, a statutory auditor*.* Under the *Code de Commerce*, the books that must be prepared and made available include: (1) a journal for the entry of the day-to-day transactions; (2) a record for the annual registration of the inventory of assets and liabilities (balance sheet and supporting details, profit and loss account). Intellectual property, including patents, is to be included as an asset.

A Luxembourg company must maintain all books necessary to track incoming and outgoing invoices to permit an evaluation or "control" of the statements relative to the Value Added Tax (VAT). These statements are required to be filed periodically with the government and accompany the quarterly payment of the VAT.

Under Section 209 of the Companies Act of 10 August 1915, as amended in 1929, a Luxembourg holding company is required to provide extensive information in its annual accounts, including a full listing of all assets, including unpaid subscribed capital, formation expenses, fixed assets, current assets, prepaid expenses, and all liabilities, including share equity, provisions for contingencies and expenses, all debts and all deferred income. In addition, holding companies are required to provide, *inter alia,* the details of all commitments and guarantees, and any loans to directors.

Luxembourg Social Security regulations also require that all companies maintain a number of records, including a register for each staff member with information regarding identity, family status, address and date of employment. The Luxembourg Tax Department requires that all companies file an annual tax return, even if the company has not realized a profit. The tax returns must be supported by a copy of the company's trial balance and by a detailed balance sheet and profit and loss account, or income statement, and details of fixed assets and depreciation of such assets, and of all items that are placed on or removed from reserve. In addition, Luxembourg law requires all companies to provide

tax authorities with annexes showing all remunerations paid by the company and certain data relative to the beneficiaries.

Finally, both Gibraltar and Luxembourg require all companies to report, on an annual basis, any transaction that would affect the value of any of its assets, including intellectual property. While both countries, as well-known "tax havens," maintain confidentiality of most if not all of the corporate documents mentioned above, they each require that the companies and their directors retain copies of the filed documents.

I have included an abbreviated résumé for your use in qualifying me as an expert in the event I am called to testify. If you have additional questions, please contact me.

Sincerely,

W. L. Jimets

W.L. Jimets

W.L. JIMETS

EDUCATION

YALE UNIVERSITY, LL.M. (International Law) (1994)
Editor, Yale Journal of International Law; Sterling Honors fellowship

COLUMBIA UNIVERSITY SCHOOL OF LAW, J.D. (1987)
Harlan Fiske Stone Scholar (Honors)

UNIVERSITY OF WASHINGTON**,** B.A. *cum laude* (Political Science) (1982)
Academic Achievement Scholarship

INTERNATIONAL AND LAW PRACTICE

INTERNATIONAL HUMAN RIGHTS LAW GROUP (1992-1993)

Attorney, Bucharest, Romania
Developed and trained a network of attorneys to address human rights and election law violations in Romania.

SIMMER EUROPE (1989-1992)

Corporate Counsel, Amsterdam, The Netherlands
Served as European corporate counsel for international company, handling legal and business issues including: European Union antitrust law, food and drug law, corporate reorganization, intellectual property and labor law. Supervised outside legal counsel in Germany, The Netherlands, Belgium, France, and the United Kingdom.

AVERY AND HILL (1984-1989)

Attorney, Hampton Office
Intensive corporate, real estate, banking and transactional work.
Representative clients: PepsiCo; Fuji Bank; City of Tacoma (bonds); and numerous other corporate and banking clients.

L'UNION JUIVE INTERNATIONALE POUR LA PAIX (1982-1983)

Head Secretariat, Paris, France

LEGAL EDUCATOR

COLUMBIA STATE UNIVERSITY COLLEGE OF LAW (1994-present)
Professor of Law (tenured)
Courses taught: European Union Law; Comparative Law; International Trade and Investment; International Business Transactions; Sales (U.C.C.); International Law; International Practice Clinic; International Human Rights.

UNIVERSITY OF FRANKLIN SCHOOL OF LAW (1994-1997)
Assistant and Associate Professor (untenured)
Courses taught: International Business Transactions: Legal Aspects of Foreign Investment; Advanced International Human Rights; Appellate Advocacy.

YALE UNIVERSITY LAW SCHOOL (1993-1994)

Teaching Fellow
Team-taught International Human Rights

LANGUAGES

Fluent in English, French, Spanish and Romanian

PUBLICATIONS (last three years)

BOOKS and CHAPTERS

THE GREENBOOK: MANUAL OF INTERNATIONAL. AND FOREIGN LEGAL CITATION (Jimets & Goldman, eds., Hein Publishers, publication expected fall, 2010)

ENCYCLOPEDIA OF FOREIGN BUSINESS RECORDS (Elvier Publishing, 2009)

LAW REVIEWS AND OTHER PUBLICATIONS

Introduccion: *Los Pilares Fundamentales Para El Reconociniento de los Derechos Ilumanos y la Democracia: la Reconciliation, el Estado de Derecho y la Paz Nacional e Internacional*, ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 731 (2006) [English Translation: Introduction: *The Fundamental Pillars for the Recognition of Human Rights and Democracy: The Reconciliation, and the State of Right and the National and International Peace*]

Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection, ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 645 (2007)

The Demise of the Nation-State: Towards a New Meaning of the State Under International Law, BERKELEY JOURNAL OF INT'L LAW 193 (2008)

BAR ADMISSIONS

Columbia, California and the European Union (International Law Practice)

FEBRUARY 2009

California Bar Examination

Performance Test A

LIBRARY

PANNINE v. DRESLIN, et al.

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA RULES OF CIVIL PROCEDURE

§44.1 Proof of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Columbia Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Comment: Because Columbia and the federal rules expressly permit the court to make a determination of foreign law without being bound by the rules of evidence, the trial court has very broad discretion. For example, the court may consider direct testimony or a declaration from a lawyer who is a member of the bar of the foreign jurisdiction, a law professor familiar with the law of the other jurisdiction, and a declaration of an expert in the other jurisdiction's law (including testimony or a declaration from a non-lawyer). An individual is qualified to testify on the law of a particular jurisdiction if the education or occupation of the witness indicates he has acquired a practical working knowledge of the foreign law. Of course, the ability to understand the language of the foreign country is helpful in qualifying a witness, but the inability to understand the language may not be fatal.

SELECTED PROVISIONS OF THE COLUMBIA BUSINESS CODE

§77 Fraudulent Transfer Act

§77.1 Definitions

As used in §§77.1 – 77.12:

* * *

(2) "Asset" means property of a debtor, but the term does not include:
(a) Property to the extent it is encumbered by a valid lien;
(b) Property to the extent it is generally exempt under nonbankruptcy law; or
(c) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:
(a) If the debtor is an individual:

1. A relative of the debtor or of a general partner of the debtor;
2. A partnership in which the debtor is a general partner;
3. A corporation of which the debtor is a director, officer, or person in

control;

(b) If the debtor is a corporation:

1. A director of the debtor;
2. An officer of the debtor;
3. A person in control of the debtor.

(8) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(9) "Property" means anything that may be the subject of ownership.

(10) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

* * *

§77.5 Transfers fraudulent as to present and future creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was undisclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

§77.6 Transfers fraudulent as to present creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

§77.7 When transfer made or obligation incurred

For the purposes of §§77.1 – 77.12:

(1) A transfer is made:

* * *

(b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under §§77.1 – 77.12 that is superior to the interest of the transferee.

§77.8 Remedies of creditors

(1) In an action for relief against a transfer or obligation under §§77.1 – 77.12, a creditor may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

3. Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Abraham v. Yoram
Columbia Supreme Court (2007)

Abraham and Yoram are business partners and shareholders in a foreign corporation known as "Nitro Plastic Technologies, Ltd." The corporation maintained a bank account at the Bank of London, on which both Abraham and Yoram were authorized signers. Yoram filed a verified complaint against Abraham alleging that Abraham withdrew $760,000 from the corporate account without Yoram's authorization by forging Yoram's signature on the withdrawal authorization form. Yoram further alleged that Abraham deposited the money in newly-opened bank accounts at NationsBank, N.A. and Washington Mutual Bank. The trial court entered an *ex parte* injunction prohibiting the two banks from allowing withdrawal of those monies.

Abraham appealed the injunction, arguing that the complaint failed to state a cause of action for injunctive relief in that it did not set forth a showing of irreparable harm, a clear legal right, an inadequate remedy at law, or that an injunction would serve the public interest. The Court of Appeals reversed holding that the trial court erred in enjoining Abraham from removing assets because Yoram had an adequate remedy at law in the form of money damages.

The court below reached the correct result based on an abundance of authority. The holding harmonizes with legal precepts that had their beginnings in the fourteenth century. However, at the beginning of a new century, we must reexamine these principles to be certain a trial judge can fashion a remedy that does justice in this and similar cases.

Yoram's complaint alleged that Abraham, "by the artful use of a copy and facsimile machine," caused the "wrongful withdrawal of $760,000" from a business account. The complaint also alleged that there was a "substantial likelihood that Abraham will abscond with whatever monies are not restrained" and "that there is a great likelihood that the Defendant will be a candidate for flight to a foreign jurisdiction." Here and

below, Yoram emphasized that without an injunction, he will be left with an empty "piece of paper entitled ‘judgment’."

Yoram's complaint contained two counts, conversion and unjust enrichment, both actions at law. In a motion for preliminary injunction, Yoram sought to freeze Abraham’s bank accounts. (See Columbia Business Code, §77.5 Fraudulent Transfer Act, for the “badges of fraud” Yoram is required to prove to establish his right to such relief.) Many Columbia cases have held that a court may not grant the equitable relief of an injunction incident to an action at law, such as conversion, because “an action for equitable relief, such as an injunction, cannot be maintained unless it falls within some acknowledged basis of equity jurisprudence.” *Messina v. Cole* (Col. S. Ct., 1931).

Many Columbia cases explain that a party seeking an injunction must demonstrate: 1) irreparable harm; 2) a clear legal right; 3) an inadequate remedy at law; and 4) consideration of the public interest. We have held that the loss of money from a corporate bank account does not constitute irreparable harm because the loss can be compensated for by money damages. The test of the inadequacy of a remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible.

The decisions that form the basis of this rule predate the 1967 Columbia merger of the law and equity courts.[1] With the merger of the law and equity courts, the historical reasons for equity's deference to common law courts and remedies disappeared. The pre-merger Columbia cases reflect the need to preserve the structural distinction between law and equity in the court system. Post-merger cases are hamstrung by the language of the older, binding authority and are therefore prevented from looking behind the irreparable injury rule to consider its logic and justice.

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[1] In 1967, Columbia adopted rules of civil procedure which gave the trial courts jurisdiction to hear cases in which counts at law and counts in equity were pleaded in the same complaint as alternative grounds for relief. Prior to that time Columbia's courts of law were separate from its courts of equity.

To modern lawyers, the choice between legal and equitable remedies is historical and almost wholly dysfunctional. Prior to the merger of the courts, lawyers had to be skilled at drawing the distinction between legal and equitable remedies. The penalty for bringing a case in the wrong court was dismissal or transfer to the correct side of the docket.

Under modern pleading rules, equitable and legal causes of action may travel in the same complaint. Legal scholars have made a compelling argument that a preliminary injunction should be available to a plaintiff in an action at law who demonstrates that a defendant will dissipate or hide assets unless restrained by the court. Until now, to obtain a preliminary injunction, a plaintiff had to prove that: (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has no adequate remedy at law; (3) he has a clear right to the relief requested and a substantial likelihood of success on the merits; and (4) a preliminary injunction will serve the public interest.

As to the irreparable harm/inadequate remedy aspects of the showing necessary for a preliminary injunction, we conclude that when the plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. The most compelling reason in favor of entering a preliminary injunction is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.

This approach is contrary to our earlier decisions, but, if the plaintiff can prove that the defendant is about to dissipate assets to render herself judgment-proof, it is difficult to see how the potential money judgment will be an adequate remedy for the plaintiff. Decisions such as those rendered earlier by this Court are incorrect to the extent they hold that a money judgment is an adequate remedy regardless of whether the defendant is engaged in conduct designed to render the judgment unenforceable.

If the inadequate remedy portion of the preliminary injunction equation is eliminated, the other prerequisites to such relief would create a workable legal framework for ruling on the issuance of a preliminary injunction that balances the interests of a defendant with those of the plaintiff and the public. To decide whether a preliminary injunction should issue, a trial court must balance the hardships between the plaintiff and the defendant. There are two ways to mitigate the hardship on the defendant. One is to require the plaintiff to post a monetary surety to protect the defendant in the event defendant prevails. The other is that the court can fashion a flexible preliminary injunction that gives the defendant some access to funds. During the pendency of a preliminary injunction, a defendant may seek modification to obtain funds for specified uses.

Finally, a preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest in five ways: 1) the injunction protects the integrity of the judicial process; 2) the injunction reduces any incentive the defendant would have to delay the litigation; 3) a preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against her or even force her into involuntary bankruptcy; 4) a preliminary injunction is less likely to affect the rights of innocent third parties who may be in possession of a defendant's property than prejudgment attachment or garnishment; and 5) because of the geographical limitations of attachment, an injunction, which operates *in personam* on a defendant, eliminates the need for duplicative actions in multiple states.

Columbia has tied itself to a rule of law firmly rooted in history, but for which the original justification has evaporated. A reconsideration of the rule compels the conclusion that, assuming the other prerequisites are met, a preliminary injunction may issue where the plaintiff has proven a demonstrable risk that the defendant will transfer, hide, or dissipate her assets, even if the plaintiff's claim is based on an action at law.

The decision of the Court of Appeals is reversed with the thanks of the Court for certifying a question of great public importance. The preliminary injunction issued by the trial court is reinstated.

The Columbia Trust Company v. Foster and Wentz
United States District Court for the Northern District of Columbia (2008)

The Columbia Trust Company, a Columbia corporation, filed suit in the district court against defendant Foster, a citizen of Ohio, alleging breach of contract. At the time of service of process upon Foster, he was the owner of certain real estate in Doral County, Columbia. One week after service, a deed was filed in Doral County conveying title to the property to Wentz.

While the lawsuit was pending and early in the discovery process, Columbia Trust joined Wentz and sought, in the alternative, prejudgment equitable relief: a preliminary injunction against Wentz forbidding further transfer of the property; a writ of attachment against the property itself; and an order setting aside the conveyance as fraudulent. In support of its request for equitable relief, Columbia Trust submitted the declaration of its attorney that included the following claims of fact: Foster was the owner of the property at the time the suit was filed; the telephone listed for the property was and had been for at least 10 years in the name of Foster; the property was valued at more than $1 million; and the transfer of the property to Wentz was without consideration.

Based on this information, the Court ordered immediate depositions of Foster and Wentz on the question of the transfer of the property. Depositions were taken and additional declarations were filed. On the basis of the pleadings, declarations and depositions, the Court has made findings of fact as follows.

Foster and Wentz have been very close friends for more than 35 years. Each was familiar with the business affairs of the other, and Wentz knew of Foster's indebtedness to Columbia Trust. Foster was served in the law action on January 20, 2007. That evening, Foster advised Wentz of the service of process and they fully discussed the matter. Within the next three days, as fast as they could take care of it, the two of them consulted a close friend, a certified public accountant, and then an attorney who prepared a deed conveying the property to Wentz. This deed was recorded one week after Foster was served. Wentz does not remember seeing the deed or receiving it, or

the circumstances regarding its execution. Wentz admits that he gave Foster no money for the deed and that there were no discussions as to money or other consideration. There were no other papers, such as a contract of sale or closing statement, relating to the transaction. Wentz frankly admitted that the purpose of the deed was to avoid the possibility of the property being sold under any judgment in favor of the Columbia Trust Company against Foster. Wentz further testified that he executed a will in which he devised the property to Foster, to the exclusion of his own relatives. Wentz asserted, however, that he held the property in trust for Foster as the beneficiary.

Foster continues to pay the utility bills for the property. The property was leased for seasonal periods and produced income. The income tax returns of Foster, including one filed after the transfer, disclose that he filed such returns as the owner of the property, and reported the income received as his own income, taking deductions for interest, taxes, depreciation and other allowable items. Foster had sole charge of the property, received and deposited the income from it in his bank account, and disbursed funds from his account for the payment of expenses in connection with the property. Foster maintained complete insurance on the property, paid the premiums thereon, and continued to carry this insurance, even after the conveyance of the property to Wentz, and in all of such policies Foster was named as insured. Foster has no other property in Columbia which could be levied upon to satisfy a judgment in favor of Columbia Trust. Foster has continued in full use and possession of the premises in the manner and to the extent as that which existed prior to the conveyance.

Discussion

This diversity case will be decided by applying the law of Columbia. *Hanna v. Plume*, 380 U.S. 460 (1965). The recent decision of the Columbia Supreme Court in *Abraham v. Yoram* (Col. S. Ct., 2007), dramatically altered how trial courts should address requests for equitable relief in the context of an action at law such as Columbia Trust's breach of contract claim. By dispensing with the "adequate remedy at law" bar to addressing equitable remedies in a

contract case, the Supreme Court granted trial courts the power to fashion rational orders that meet the needs of the litigants.

Columbia Trust's request for equitable relief must be measured, therefore, against the standard set out in *Abraham*. To obtain a temporary injunction, Columbia Trust must prove that: (1) it will suffer irreparable harm unless the status quo is maintained; (2) it has a clear legal right to the relief requested and a substantial likelihood of success on the merits; and (3) a temporary injunction will serve the public interest.

The first element of the standard – irreparable harm – requires Columbia Trust to establish that Foster's conveyance of the property to Wentz was fraudulent. Section 77 of the Columbia Business Code is the state's codification of the Uniform Fraudulent Transfer Act and §77.5 sets out actions by a party that will result in a fraudulent conveyance, the so-called "badges of fraud." The Fraudulent Transfer Act expands available remedies. It does not in and of itself confer a cause of action. However, the Act does inform the analysis of whether there will be irreparable harm.

The Court notes that every one of the indicia of fraud set out in the statute are present in the instant case, with the exception of secrecy or concealment, since the conveyance was recorded. Indeed, on the facts we have outlined above, this is a classic case of fraudulent conveyance. It also is noted that the property that is the subject of this equitable action is Foster's only asset of value in Columbia.

As to the second element, the pleadings make it clear that Columbia Trust has presented a *prima facie* case that it is likely to succeed on the merits of the underlying breach of contract claims alleged in the complaint. The well-pleaded facts plus references to the depositions thus far completed make it clear that the parties contracted and that Foster assumed an obligation to compensate Columbia Trust. Although Foster has asserted affirmative defenses, the Court finds Columbia Trust has met its burden, according to Columbia law, at this stage of the proceedings.

Finally, a temporary injunction certainly will serve the public interest. As the Court noted in *Abraham*, "a preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest" in several ways. Here, an injunction will protect the integrity of the judicial process by preventing Foster and Wentz from conveying the property to innocent third parties who would become unnecessarily embroiled in this dispute; an injunction will reduce any incentive defendants would have to delay the litigation; and an injunction will reduce the likelihood that other creditors of Foster will rush to file claims against him or even force him into involuntary bankruptcy.

Therefore, Foster and Wentz are temporarily enjoined from further conveying the property in question and are mandated to preserve the value of the property. The Court will determine at the conclusion of the litigation the necessity of setting aside the conveyance and making the property available to satisfy any judgment in favor of Columbia Trust.

SO ORDERED.

FEBRUARY 2009
ESSAY QUESTIONS 4, 5, AND 6

California
Bar
Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

ConsumerPro, a consumer protection group, published a manual listing the names, addresses, telephone numbers, and specialties of attorneys who represent plaintiffs in tort cases. The manual also included comments rating the attorneys. The manual was distributed by ConsumerPro to its members to aid them in the selection of an attorney should they need one.

Paul was listed in the manual as an attorney who litigates automobile accident cases. In the related comments, the manual stated that "Paul is reputed to be an ambulance chaser and appears to handle only easy cases."

Paul sued ConsumerPro for defamation, alleging injury to reputation and requesting general damages. ConsumerPro moved to dismiss for failure to state a claim on which relief could be granted, on the grounds that (1) the statement was non-actionable opinion, (2) Paul failed to allege malice or negligence under the United States Constitution, (3) Paul failed to allege special damages, and (4) in any event, the statement was privileged under the common law.

How should the court rule on each ground of the motion to dismiss? Discuss.

Question 5

Developer had an option to purchase a five-acre parcel named The Highlands in City from Owner, and was planning to build a residential development there. Developer could not proceed with the project until City approved the extension of utilities to The Highlands parcel. In order to encourage development, City had a well-known and long-standing policy of reimbursing developers for the cost of installing utilities in new areas.

Developer signed a contract with Builder for the construction of ten single-family homes on The Highlands parcel. The contract provided in section 14(d), "All obligations under this agreement are conditioned on approval by City of all necessary utility extensions." During precontract negotiations, Developer specifically informed Builder that he could not proceed with the project unless City followed its usual policy of reimbursing the developer for the installation of utilities, and Builder acknowledged that he understood such a condition to be implicit in section 14(d). The contract also provided, "This written contract is a complete and final statement of the agreement between the parties hereto."

In a change of policy, City approved "necessary utility extensions to The Highlands parcel," but only on the condition that Developer bear the entire cost, which was substantial, without reimbursement by City. Because this additional cost made the project unprofitable, Developer abandoned plans for the development and did not exercise his option to purchase The Highlands parcel from Owner.

Builder, claiming breach of contract, sued Developer for the $700,000 profit he would have made on the project. In the meantime, Architect purchased The Highlands parcel from Owner and contracted with Builder to construct a business park there. Builder's expected profit under this new contract with Architect is $500,000.

What arguments can Developer make, and what is the likely outcome, on each of the following points?

1. Developer did not breach the contract with Builder.
2. Developer's performance was excused.
3. In any event, Builder did not suffer $700,000 in damages.

Discuss.

Question 6

Stage, Inc. ("SI") is a properly formed close corporation. SI's Articles of Incorporation include the following provision: "SI is formed for the sole purpose of operating comedy clubs." SI has a three-member Board of Directors, consisting of Al, Betty, and Charlie, none of whom is a shareholder.

Some time ago, Charlie persuaded Al and Betty that SI should expand into a new business direction, real estate development. After heated discussions, the board approved and entered into a contract with Great Properties ("GP"), a construction company, committing substantial SI capital to the construction of a new shopping mall, which was set to break ground shortly.

Although Charlie remained enthusiastic, Al and Betty changed their minds about the decision to expand beyond SI's usual business. SI was struggling financially to keep its comedy clubs open. Al and Betty decided to avoid SI's contract with GP in order to devote all of SI's capital to its comedy clubs.

Last month, GP approached Charlie about another real estate project under development. GP was building a smaller mall on the other side of town and was seeking investors. Aware that Al and Betty were unhappy about the earlier contract with GP, Charlie believed that SI's board would not approve any further investments in real estate. As a result, Charlie decided to invest his own money in the endeavor without mentioning the project to anyone at SI.

Meanwhile, Al and Betty have come to suspect that Charlie has been skimming corporate funds for his personal activities, and, although they have little proof, they want to oust Charlie as a director.

1. Under what theory or theories might SI attempt to avoid its contractual obligation to GP and what is the likelihood of success? Discuss.

2. Has Charlie violated any duties owed to SI as to the smaller mall? Discuss.

3. Under what theory or theories might Al and Betty attempt to oust Charlie from the Board of Directors and what is the likelihood of success? Discuss.

FEBRUARY 2009

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

PHOENIX TOWERS v. PORTER

FILE

PHOENIX TOWERS v. PORTER

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

To: Applicant

From: George Randall

Date: February 26, 2009

Re: **Phoenix Towers v. Porter**

Our clients, Richard and Cathy Porter, who recently had a baby, are long-time tenants at the Phoenix Towers. Phoenix Towers has a rule that limits occupancy of one-bedroom units to two people. Last week, they received a thirty-day notice of termination of tenancy, and the landlord said they would be served with an unlawful detainer action if they did not move out. The question is whether the eviction constitutes unlawful discrimination based on familial status.

I conducted an interview with the Porters last week after they received the thirty-day notice from the Phoenix Towers. The Porters have an appointment with me tomorrow to discuss their options. It is clear that the landlord will not agree to a settlement in this matter.

As I see it now, there are several options we might pursue. We could defend the imminent unlawful detainer action. We could file a lawsuit in state court. We might also file an administrative complaint. It is unclear to me whether it would be better for the Porters to stay in the premises or move out while pursuing any or all of these options. I, however, need more analysis of the consequences of each option. Therefore, in order to help me prepare for this meeting, I would like you to draft a counseling memo in accordance with the guidelines set forth in our office policy, which is attached.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

To: Attorneys

From: Jean Marcus

Re: **Requirements for Counseling Memos**

Members of the firm often conduct a counseling session with a client who is confronted with several significant and difficult choices. In such a situation, the attorney should prepare a counseling memo to the supervising attorney for use in the counseling session.

All counseling memos will use the following format:

- State your understanding of the client's goal or goals.

- Identify all options available to the client.

- For each option, identify the possible consequences or results, whether legal, economic, or personal. Be sure to explain the possible consequences or results, why they are possible, and how likely they are to occur. This will require a discussion of the interrelationship of the law and facts.

- Where a possible option, consequence, or result is unclear, identify what additional information we need, why we need it, and how it can be obtained.

TRANSCRIPT OF FEBRUARY 19, 2009 INTERVIEW WITH

RICHARD AND CATHY PORTER

George Randall (Randall): Why don't you have a seat over here? I want to make sure the microphone is able to pick up all of our voices.

Cathy Porter (Cathy): Okay. Thanks so much for seeing us over the lunch hour. We are concerned about this notice and want to get your help right away.

Randall: No problem. I just want to reiterate that you've agreed that I can record this interview so that I can concentrate better on what you're saying.

Richard Porter (Richard): That's fine.

Randall: So, you said something about a notice?

Cathy: Yes, it's from our landlord. We live in a one-bedroom unit at the Phoenix Towers. We moved in about ten years ago. We originally signed a one-year lease. After the expiration of the lease, I guess it converted to a month-to-month lease. Here's the original lease.

Randall: I see that Phoenix Towers limits occupancy to two persons in a one-bedroom unit.

Richard: That's right, and since we've just had a baby, we're now in violation of the lease.

Randall: Does Phoenix Towers have any two-bedroom units?

Cathy: Yes, there are two-bedroom units in the complex, but none are available now, and anyway we're not in a position financially to pay the higher rent, which may be as much as $500 more a month. I'm taking six months off to stay home with the baby, and we'll only have one income during most of that time. This is very upsetting. As I said, we've lived here for ten years. We know a lot of our neighbors, and we feel part of the community. And it is an easy commute to work for Richard. The housing market is so tight right now. It's pretty hard to find affordable housing in this part of town and our one-bedroom unit is very spacious. We've probably spent 20 hours between the two of us over the last week looking at ads, calling real estate agents, and looking at vacant apartments just in case we have to move. Nothing is available at our current rent rate in this neighborhood.

Randall: Do you think you've exhausted all other possibilities?

Cathy: Yes, we've discussed it, and can't think of any other options for a place to live that we can afford.

Randall: How would you like things to work out?

Richard: We really need to stay in our apartment for now. But, that's why we're here. We don't know whether there's any way we can fight this, and whether we want to fight even if there is. It just seems so unfair.

Randall: I'm guessing that you're feeling pretty overwhelmed right now. Being new parents is hard enough, but it's so much harder if you're anxious about your living situation at the same time.

Cathy: You've got it. Neither of us has been sleeping very well and I feel on edge all the time wondering what's going to happen.

Richard: I broke out in hives after our last meeting with the manager. He came to see us as soon as we came home from the hospital with the baby. He told us that we are in violation of the lease. I told him that I couldn't believe they would make us move. He said that the owner was adamant about enforcing the occupancy limit in all cases.

Randall: Here's what I'd recommend. I believe you may have a claim for housing discrimination based on this occupancy standard, but before proceeding, I need to do some research, ask you a few more questions, get your authorization to hire a housing expert to do a preliminary investigation, and set an appointment with you next week to discuss your options. How's that sound?

Richard: That sounds okay, but how much is all this going to cost? We can't afford to spend very much on this.

Randall: Some of the options may involve what are called "attorney's fee provisions" that will require the landlord to pay our fees if you win. In other words, we wouldn't be paid unless you win. I will advise you more fully about costs of various options when we meet again.

Richard: That would be great. And then we can give serious thought to whether this is worth it to us. You said you had more questions?

Randall: I'm wondering, do you recall anything about how you found out about the Phoenix Towers before you moved in? Was it a newspaper ad? Did someone tell you about it?

Cathy: I think we heard about it from friends. The manager seemed nice when we called to ask about vacancies.

Randall: Anything else you remember?

Cathy: Not really.

Randall: Do you remember seeing any children when you visited the apartments?

Cathy: I don't recall specifically. There are definitely a few children who live there, but I have no idea whether they live in one- or two-bedroom units.

Randall: Has anyone ever said anything about children living at Phoenix Towers?

Cathy: No, but I would say that the vast majority of people who live there are singles or couples. There aren't very many amenities that would attract families – no play areas, no equipment. Come to think of it, I don't even see that many children at the pool.

Randall: So, do you have the feeling that the Towers is considered an adults-only complex?

Cathy: You know, I have no idea.

Richard: I don't either.

Randall: Any idea how large the complex is?

Cathy: I think it's around 200 apartments. There are four multi-story towers. There's an adjoining parking lot, and there's a swimming pool in a courtyard between the towers. It's a very nicely maintained complex, and we love living there.

Randall: Well, this has been very helpful. I will get a housing expert on this right away and we'll see you next week, okay?

Richard: Thanks so much. We'll see you then.

END OF INTERVIEW

LEASE AGREEMENT

THIS LEASE AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into this 15th day of January, 1999, by and between Phoenix Towers (hereinafter referred to as "Landlord") and Richard and Cathy Porter (hereinafter referred to as "Tenant"). This lease covers the premises known as 475 Phoenix Drive, Unit A-75, Rushmore, Columbia (the "Premises").

1. TERM. This Agreement shall commence on January 15, 1999. The termination date shall be on (date) January 14, 2000 at 11:59 PM. Upon termination date, this Agreement will continue on a month-to-month basis on the same terms. Any term may be modified upon proper notice by the Landlord.

2. RENT. Tenant shall pay to Landlord Eight hundred fifty DOLLARS ($ 850) per month as Rent for the Term of the Agreement. Due date for Rent payment shall be the 1st day of each calendar month and shall be considered advance payment for that month. If not remitted on the 1st, Rent shall be considered overdue and delinquent on the 2nd day of each calendar month.

3. DAMAGE DEPOSIT. Upon the due execution of this Agreement, Tenant shall deposit with Landlord the sum of Seventeen hundred DOLLARS ($ 1700), receipt of which is hereby acknowledged by Landlord, as security for any damage caused to the Premises during the term hereof. Such deposit shall be returned to Tenant, without interest, and less any setoff for damages to the Premises upon the termination of this Agreement.

4. USE OF PREMISES. The Premises shall be used and occupied by Tenants, exclusively, as a private single family dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Tenant for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single family dwelling. Tenants agree that the occupancy of this:

Xone-bedroom unit shall be limited to two permanent occupants at all times.

□ two-bedroom unit shall be limited to four permanent occupants at all times.

* * *

12. ATTORNEYS' FEES. Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee.

* * *

Rachel Simone _____ Richard Porter _____

Phoenix Towers, Landlord
Printed Name: Rachel Simone

Tenant
Printed Name: Richard Porter

Cathy Porter _____

Tenant
Printed Name: Cathy Porter

THIRTY-DAY NOTICE OF TERMINATION OF TENANCY

TO: [name(s) of the tenant(s)] ____Richard and Cathy Porter_____

AND TO ALL PERSONS IN POSSESSION OF THE PREMISES COMMONLY KNOWN AS [address of the property] _____475 Phoenix Drive, Unit A-75_____,

_____Rushmore, Columbia_____:

NOTICE IS HEREBY GIVEN that within thirty (30) days after service of this Notice on you, you are hereby required to quit the above-described premises and deliver up the possession of same to the Lessor or Lessor's agent if specified below.

FURTHER NOTICE IS HEREBY GIVEN that said lessor hereby elects to terminate your month-to-month tenancy of the above-described premises and that if, within thirty (30) days after service of this Notice upon you, you have not quit the above-described premises, the undersigned will institute legal proceedings for Unlawful Detainer against you to recover damages and possession of the premises from you.

DATED: February 18, 2009

___Rachel Simone_____

Phoenix Towers, Landlord

Printed Name: Rachel Simone

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

MEMORANDUM

To: File

From: George Randall

Date: February 23, 2009

Re: **Summary of Columbia Department of Fair Housing (DFH) Administrative Complaint Process**

1. Intake -- Complainants are first interviewed to collect facts about possible discrimination.

2. Filing -- If the complaint is accepted for investigation, formal complaint is drafted, signed and served on the Respondent by DFH. The Respondent is required to answer the complaint and is given the opportunity to voluntarily resolve it. A no-fault resolution can be negotiated at any time during the complaint process.

3. Investigation -- DFH investigates every case and has the authority to take depositions, issue subpoenas and interrogatories and seek Temporary Restraining Orders when appropriate. If the investigative findings do not show a violation of the law, DFH will close the case.

4. Conciliation -- Formal conciliation conferences are scheduled when the investigative findings show a violation of the law. If formal conciliation fails, litigation may be recommended.

5. Litigation -- After issuing an accusation, DFH legal staff litigates the case before the Fair Housing Commission (FHC).

6. Remedies -- The FHC may order remedies for out-of-pocket losses, injunctive relief, access to the housing previously denied, additional damages for emotional distress, and civil penalties up to $10,000 for the first violation. Attorney's fees are also awardable by the FHC.

7. FHC rarely grants preliminary injunctive relief, and this was confirmed by my friend who works as a staff attorney at DFH. FHC determinations typically take at least one year to be issued from the time the complaint is filed.

8. There is no requirement to exhaust administrative remedies under state law. Statutes of limitations for court actions are tolled while administrative proceedings are pending.

9. If, as an alternative, the case is initially filed in civil court, DFH will not accept an administrative complaint based on the same allegations of discrimination.

Ralph Frankel, Ph.D.
2525 Lookout Street
Rushmore, Columbia 99999
Tel. (555)888-2525

To: George Randall, Esq.
From: Ralph Frankel, Ph.D.
Date: February 23, 2009
RE: Phoenix Towers

This report is prepared pursuant to my retention agreement to serve as your housing expert.

Summary of demographic data:

Census data for the year 2000 establishes that in the Standard Metropolitan Statistical Area in which the Phoenix Towers is located, 50% of renter households have children.

On-site observation

I spent two mornings and two afternoons watching ingress and egress from the parking structure at Phoenix Towers. I observed approximately 125 different cars coming and going from the premises. I observed very few people who appeared to be walking to school or work. None of the pedestrians were children. Of the 125 cars, I observed only two cars with children. One adult and one child rode in each of those cars. I managed to interview both adults and was told by each that there are only five families with children at Phoenix Towers. Three of them are in two-bedroom units, and two are in one-bedroom units.

Public records research

Property tax records indicate that there are 200 units at the Towers, 180 one-bedroom units, and 20 two-bedroom units.

A review of court records showed that there have been five unlawful detainer actions filed by the owners in the past two years. In reviewing the defenses raised by tenants in these actions, none raised discrimination as an affirmative defense. One of the unlawful detainers by the owners was against a two-person family in a one-bedroom unit who had an elderly parent move in. There were no lawsuits on record filed against the landlords.

Columbia's Department of Fair Housing reveals no complaints filed against the owners.

A review of print ads in the local newspaper reveals that up until the early 1980's the Phoenix Towers advertised itself as an "adults-only" complex.

Conclusion

Assuming for purposes of this analysis that there are at most five families with children residing at Phoenix Towers, there is an extremely low probability that this proportion of families with children would have occurred by chance. That is, the proportion of families with children should be much higher, given the much higher incidence of families with children in the nearby neighborhoods. Since the proportion of renter households with children is 50%, the census data would predict that at least 100 families with children would reside at Phoenix Towers.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

MEMORANDUM

To: Porter File

From: George Randall

Date: February 23, 2009

Re: Estimate of Fees

My current rate is $200 per hour. Unlawful detainer defense for this matter will range from 5-20 hours ($1,000- $4,000), billed on an hourly basis.

Estimate of fees for affirmative discrimination case: $40,000

Estimate of fees for DFH administrative hearing: $5,000

I have confirmed that attorney's fees can be awarded to prevailing plaintiffs in successful, affirmative discrimination cases brought under the FHA. If it turns out that there is a good discrimination claim, the firm would be willing to represent the Porters without charge and take our chances on an award of statutory attorney's fees.

FEBRUARY 2009

California Bar Examination

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PHOENIX TOWERS v. PORTER

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Rowan v. Las Brisas Apartments
Columbia Supreme Court (1994)

> This case interprets the 1988 amendments to the Columbia Fair Housing Act (FHA) that, *inter alia*, added a provision protecting familial status. Defendant appeals from the judgment below finding that it violated the FHA and awarded damages and injunctive relief. Defendant argues that the court erred in failing to require Plaintiff to prove an intention to discriminate and in imposing a "compelling business purpose" standard on Defendant's conduct. We hold that a showing of actual discriminatory intent is not necessary for plaintiffs to prevail in a case of housing discrimination based on familial status. We also hold that discrimination based on familial status can be proved by a showing of disparate impact, the only rebuttal to which is whether defendant can show that its action is the least restrictive means to achieve a compelling business purpose.

Defendant Las Brisas Apartments ("Las Brisas") is a condominium complex in Hunter Beach, Columbia. The complex consists of 76 identical two-bedroom, one-bathroom units of approximately 950 square feet each. Defendant enforces a numerical occupancy restriction of two persons per unit.

Plaintiffs, Colin and Valerie Rowan ("The Rowans"), were living at Las Brisas when Valerie Rowan became pregnant. The resident manager told the Rowans they would have to move following the birth of their child because of the occupancy restriction. After the Rowans' son was born, the resident manager told the Rowans that they would be evicted if they did not vacate their apartment voluntarily. The Rowans moved soon afterward.

The Rowans filed this lawsuit for monetary, declaratory and injunctive relief. They alleged violations of the Columbia FHA.

The FHA was adopted in 1968. The FHA initially prohibited discrimination on the basis of race, color, religion, or national origin. The legislature extended protection to familial status in the Fair Housing Amendments Act of 1988. The FHA now makes it unlawful:

> "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

Discrimination is defined to include a refusal to rent after the making of a bona fide offer, or to refuse to negotiate for the rental of, or otherwise deny, a dwelling to any person because of familial status.

Familial status is defined as one or more persons under the age of 18 domiciled with one or more parents or other legal custodians. The protection also applies to pregnant women or persons in the process of securing legal custody of any individual who has not attained the age of 18.

> Other courts have split on whether intent to discriminate must be proven. Recently, a Court of Appeal, in *Earle v. Mountain Side Mobile Estates*, squarely addressed whether a numerical occupancy restriction violates the FHA's family status provisions under a pure disparate impact theory, without proof of intent. In *Earle*, an unmarried couple and their three children were evicted from the Mountain Side Mobile Home Park for violating the park's three-person-per-trailer occupancy restriction. The court determined that national census data could be used to establish a showing of disparate impact against families with children, and the park's numerical occupancy restriction had a discriminatory effect in violation of the Act. We agree with and adopt the reasoning in *Earle* that plaintiff need not show defendant's intent to discriminate based on familial status.

Although in this case defendant's occupancy restriction is facially neutral because it treats adults and children similarly, and children in fact do reside at Las Brisas, the

restriction has a disparate impact on intact families with children, i.e., two parents and child. By refusing to rent to families composed of three or more persons, defendant excludes a large percent of families with children from renting apartments at Las Brisas. Plaintiffs supported their showing with U.S. Census family statistics. Thus, the policy has a disparate impact on the Rowans.

Here, Defendant Las Brisas' offered business justification is to prevent damage and destruction to the apartments from excessive wear and tear. Defendant argues that Las Brisas maintains an occupancy restriction policy to keep the property in good repair and to reduce ongoing maintenance and eventual resale costs.

Defendant has not cited authority to show that such economic judgments constitute a compelling necessity, nor has defendant produced evidence to demonstrate that the occupancy restriction is closely tailored to serve Las Brisas' goals. Defendant simply relies on defendant's own subjective judgment which, notwithstanding defendant's experience in the real estate industry, falls short of the necessary showing.

Even if defendant's damage prevention rationale were supported by independent evidence, it does not show the occupancy restriction is the least restrictive means to achieve defendant's purpose. Defendant does not deal with a number of less restrictive alternatives suggested by the Rowans that would appear to accomplish the same goals, such as detailed maintenance requirements, more frequent inspections, higher security deposits, or more careful tenant screening.

AFFIRMED.

Carter v. Brea

Columbia Supreme Court (1995**)**

Defendant Brea appeals from judgment following a jury trial finding that Defendant committed unfair housing practices by discriminating against persons with minor children in violation of state fair housing statutes. Defendant claims that (1) the jury's findings on disparate-treatment discrimination were unsupported because the evidence did not show any intent to discriminate, (2) the court erred in permitting the jury to award damages for emotional distress in the absence of expert medical testimony, and (3) the court awarded excessive attorney's fees to Plaintiff.

On May 1, 1981, Ernest Brea ("Brea") purchased Limehurst Apartments ("the Limehurst"). The complex consists of thirty-three one-bedroom apartments. When Brea purchased the Limehurst, the lease term on occupancy stated that residents "shall *not* be permitted to have *children under the age of 18* years."

In April 1989, the occupancy provision was revised to state:

> "Lessees who have entered into a lease agreement after July 1, 1988 shall *not* be permitted to have *more than two occupants* per lease premises . . . Lessees prior to July 1, 1988 who have more than two occupants shall be grandfathered, but the number of occupants cannot expand beyond what existed as of July 1, 1988." (Emphasis added.)

Currently, only one unit at the Limehurst houses a family with a minor child. This family moved into the Limehurst prior to 1982. No persons with minor children moved into the Limehurst after Brea purchased it, even after the occupancy provision was changed from adults-only to a two-occupant maximum.

Scott and Luanne Carter ("the Carters") moved into a unit in the Limehurst in August 1992. Brea sent them a letter on August 15, 1992 stating: "We remind you that the

Limehurst is an adult complex and if you should have children in the future you will be required to vacate the Limehurst prior to the arrival of said child."

Luanne Carter became pregnant in December 1993. The Carters' son was born September 18, 1994. When they returned home from the hospital, they found a letter from Brea informing them that they must vacate the premises "upon arrival of your third occupant." Following the letter, the Carters received telephone calls, visits, and additional letters from Brea telling them to vacate the Limehurst. On November 25, 1994, they received a 30-day notice of termination of tenancy. On December 28, 1994, the Carters were served with a summons and complaint for unlawful detainer brought by Brea.

The Carters sought legal representation. They brought the instant action seeking injunctive relief and damages. They alleged violations of Columbia's Fair Housing Act (FHA). The trial court granted a preliminary injunction enjoining the prosecution of the unlawful detainer action upon a showing of likelihood of the Carters' ultimate success on their discrimination claims, a balancing of the equities, and irreparable injury if the relief was not granted.

Prior to and during the pendency of this action, while continuing to live at the Limehurst, Luanne Carter felt humiliated by Brea's demands to vacate the premises. Consequently, she did not leave her home often. She was unable to sleep and had chest pains.

Plaintiff's theory of discrimination was that the occupancy standard was (1) adopted for the purpose of discriminating against persons with minor children by either limiting or eliminating them from occupancy in the Limehurst, and (2) although facially neutral, has an unlawful discriminatory impact because it excluded families with minor children in significant numbers. In order to prevail on an intentional discrimination theory under FHA, Plaintiffs must establish by a preponderance of the evidence that a causal connection existed between the familial status of plaintiffs and their being asked to

vacate by defendant. Plaintiffs' familial status need not have been the sole or even the dominant cause of the action. Discrimination is established if familial status was any part of the motivation for Defendant's conduct. Defendant maintained that the occupancy limit was necessary due to a limited water supply.

At trial, both parties presented expert testimony on the capacity of the water supply at the Limehurst. Defendant's expert testified that the water supply at the Limehurst was adequate to serve a maximum of sixty-six people. Plaintiffs' expert offered contrary testimony. The jury found that Defendant Brea had violated federal and state fair housing statutes and awarded $1,500 for the emotional distress and humiliation suffered as a result of Defendant's actions, and $3,000 in punitive damages. In subsequent orders, the court permanently enjoined Defendant from adopting or enforcing a two-person-per-unit occupancy limit at the Limehurst, and awarded the Carters $51,072 in attorney's fees, and $2,194.39 for costs. Defendant appealed.

FHA makes it unlawful for the owner of any housing accommodation to discriminate against any person because of, *inter alia*, the person's familial status. Familial status means "one or more individuals under 18 years of age who reside with, *inter alia*, a parent."

The Carters alleged violations of FHA under two theories of discrimination law: (1) intent to discriminate -- Defendant Brea intentionally discriminated against members of a statutorily protected category because of their membership in that group, and (2) disparate impact – Defendant's facially neutral policy has a disproportionate effect on a statutorily protected category. The jury found Defendant liable for housing discrimination under both theories. We do not address Defendant's challenges to the finding of disparate impact because we uphold the decision on the theory of intentional discrimination.

Defendant first claims that the jury could not have found disparate treatment or intent to discriminate in the absence of any direct evidence of discrimination against persons

with minor children. Intentional discrimination may be shown by circumstantial or direct evidence. Thus, the short answer to Defendant's challenge is that direct evidence is not necessary to prove an intentional discrimination claim. Indeed, direct evidence of unlawful discrimination is often difficult to obtain.

Evidence of a discriminatory practice prior to civil rights legislation, coupled with a post-legislation pattern of maintaining the status quo, may be sufficient to establish the intent to continue the discrimination through a neutral policy. In this case, there was evidence that Defendant clearly excluded minor children from the Limehurst prior to 1989. That year, apparently in response to changes in Columbia law prohibiting discrimination against familial status, Defendant changed the occupancy provision in their leases from adults-only to a two-person maximum. Although the new occupancy provision appears neutral on its face, Defendant has maintained the status quo at the Limehurst -- no minor children have moved into the Limehurst since Defendant purchased it. This evidence is sufficient to imply that the two-person occupancy limit was adopted for the purpose of eliminating or limiting persons with minor children from the Limehurst. Based on Defendant's actions against the Carters and Defendant's pattern and practice of excluding minor children from the Limehurst, we conclude that the jury properly found an intent to discriminate against persons intending to occupy a dwelling with one or more minor children.

At trial, Defendant presented evidence that his occupancy limit is based on legitimate water capacity considerations. He presented evidence on the limits of the Limehurst's water supply. The special verdict indicated that the jury did not believe the Defendant's rationale, finding that the limitations of the water system were a mere pretext for discriminating against persons with minor children.

Defendant argues that the trial court erred in permitting the jury to award damages for emotional distress. The law clearly provides for recovery of emotional distress damages, and the award here was supported by Carter's testimony.

Defendant also argues that the court awarded excessive attorney's fees. It is well settled that attorney's fees are awardable to victims of discrimination who prevail in affirmative discrimination actions. On the other hand, fees are not awardable to defendants who successfully defend against affirmative discrimination claims.

The initial estimate of a reasonable attorney's fee in state civil rights actions is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Once the court has determined the basic, "lodestar" amount, the court may adjust the fee up or down based on other factors. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the trial court did not adopt each contention raised.

AFFIRMED.

Lavelle v. Hodges
Columbia Supreme Court (1977)

Plaintiff Nancy Lavelle ("Lavelle") brought this action to set aside a deed conveyance, alleging that defendant Everett R. Hodges ("Hodges") fraudulently induced her to convey title to him. The question that we consider is whether the present suit is precluded by the prior adjudication of the fraud issue in an unlawful detainer action between the parties.

An unlawful detainer action is a summary proceeding to determine the right to possession of real property and to provide for peaceable eviction. Typically, it arises when a tenant has violated a lease or unlawfully held over beyond the term of the lease. Following termination of the tenancy through service of a three-day or 30-day notice, an unlawful detainer may be commenced. The tenant has five days to answer the complaint, and the matter proceeds to trial on a very accelerated schedule, usually within a month. No, or very limited, discovery is allowed.

It is of foremost importance to note that unlawful detainer actions are limited in scope. Ordinarily, only claims bearing directly upon the right of immediate possession are cognizable. Affirmative defenses, legal or equitable, are permissible only insofar as they would, if successful, preclude removal of the tenant from the premises. If a tenant, for example, proves that the landlord had an improper motive in serving the notice of termination and bringing the unlawful detainer action, such as the tenant's exercise of a right under the law, the tenant will retain possession. It should be noted, however, that cross-complaints are not permitted in unlawful detainers. Thus, if a tenant has affirmative claims or claims for damages, she must seek them in a separately filed action.

The trial court here found that Lavelle, who originally owned the subject property, had for several years maintained a confidential and intimate relationship with Hodges. Lavelle encountered financial difficulty, so she agreed that Hodges would temporarily take title until she recovered financially. Thereafter, the parties quarreled, and Lavelle

demanded reconveyance and Hodges refused. The record indicates the property at that time had a fair market value in excess of $40,000.

Lavelle immediately filed the present suit, framed as an action for injunctive relief and for imposition of a constructive trust. Meanwhile, Hodges served Lavelle with a three-day notice to quit the premises and upon expiration of the notice immediately initiated unlawful detainer proceedings. In the unlawful detainer action Lavelle asserted as an affirmative defense the same allegations of fraud that form the basis for the present equity action that was then pending. As is typical in unlawful detainer actions, Lavelle's answer was due five days after service of the summons, discovery was limited, trial was set within 21 days of the filing of Lavelle's answer, and the matter was tried before the court in a trial lasting one hour. Judgment in the unlawful detainer suit was given for Hodges and Lavelle was evicted. That judgment is now final.

Hodges unsuccessfully urged the unlawful detainer judgment as a bar to the present action. His motion to strike the complaint was denied, and the cause proceeded to trial on the merits. After a four-day trial, the court, on the basis of detailed findings of fact, concluded that Lavelle's conveyance had been fraudulently induced by Hodges and ordered the property returned to Lavelle.

Both Lavelle and Hodges appealed, raising not only the res judicata issue that we consider herein, but various other unrelated issues. The Court of Appeal, without considering these other issues, reversed the trial court judgment solely on the ground that Lavelle's fraud claim had been conclusively adjudicated in the prior unlawful detainer proceeding, and that judgment for Hodges in that action cut off Lavelle's right to pursue an independent claim for equitable relief. We conclude that the unlawful detainer judgment was not res judicata under the circumstances, and consequently reverse.

A judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title or to adjudicate other legal and equitable claims between the parties.

Recently, in *Wood v. Herson*, the Court of Appeal held that a suit for specific performance of a contract to convey was foreclosed by a prior unlawful detainer judgment that had decided all issues of fact material to the second action. Noting that the Woods' affirmative defense of fraud in the unlawful detainer action was virtually identical to the fraud allegations upon which their suit for specific performance was based, the court concluded that even though title normally is not a permissible issue in an unlawful detainer action, the essential issues had been fully and fairly disposed of in the earlier proceeding. The court cited in support of its ruling such varied factors as the unusual length of the "summary" unlawful detainer hearing (seven days), the scope of discovery by the parties ("extensive" and "complete"), the quality of the evidence ("detailed"), and the general character of the action ("clearly not the customary unlawful detainer proceeding"). A lengthy and comprehensive superior court record replete with precise findings of fact persuaded the *Wood* court that application of collateral estoppel to curtail further litigation would involve no miscarriage of justice, as “the Woods have had their day in court.”

We agree that "full and fair" litigation of an affirmative defense -- even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity to litigate is provided, will result in a judgment conclusive upon issues material to that defense. In a summary proceeding such circumstances are uncommon. *Wood*, however, appears to be an appropriate example. There, the parties apparently chose to waive speedy resolution of the issue of possession in favor of an extensive adjudication of their conflicting claims by a superior court invested with jurisdiction to deal with any issues the disputants agreed to try. The more usual situation is accurately characterized by this case wherein matters affecting the validity of a conveyance of title are neither properly raised in the unlawful detainer proceeding, a summary proceeding for possession, nor are they concluded by the unlawful detainer judgment.

The doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.

The record herein fails to disclose that Lavelle had the fair adversary hearing contemplated by the law. The municipal court, in Hodges' unlawful detainer action, was empowered to consider whatever equitable defenses Lavelle might have raised insofar as they pertained directly to the right of possession. The court had no jurisdiction, however, to adjudicate title to property worth considerably more than its $5,000 jurisdictional limit, nor could its judgment on the issue of possession foreclose relitigation of matters material to a determination of title except to the extent that the summary proceeding afforded Lavelle a full and fair opportunity to litigate such matters. The burden of proving that the requirements for application of res judicata have been met is upon the party seeking to assert it as a bar or estoppel. In the matter before us Hodges has failed to sustain that burden.

We are of the further opinion that a defendant in an unlawful detainer is not required to litigate, in a summary action within the statutory time constraints, a complex fraud claim. In the absence of a record establishing that the claim was asserted and that the legal and factual issues therein were fully litigated, we conclude that the question of fraudulent acquisition of title was not foreclosed by the adverse judgment in the earlier summary proceeding.

We do not envision that our holding will impose any unwarranted burden on the plaintiff in an unlawful detainer action. In return for speedy determination of his right to possession, plaintiff sacrifices the comprehensive finality that characterizes judgments in non-summary actions. Moreover, he has adequate protection against multiple litigation, for ordinarily he can prevent the introduction of extrinsic issues by making appropriate objections to the defendant's pleadings or proof.

Lavelle appealed the trial court's denial of her attorney's fee motion. The deed of conveyance contained a clause providing that Lavelle would pay Hodges' attorney's fees in the event that he incurred fees in enforcing the deed of conveyance. Columbia Civil Code section 1717 provides that:

> "in any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to one of the parties, . . . then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees. . . ."

The court erred in denying Lavelle's motion for attorney's fees.

REVERSED.